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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/02/2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LABOR FINDERS,) 1 CA-IC 09-0035
)
Petitioner Employer,) DEPARTMENT C
)
FARA,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
AUSTIN STEWART,)
)
Respondent Employee.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20073-600818

Carrier Claim No. 917340

Administrative Law Judge Deborah Nye

AWARD SET ASIDE

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K E S S L E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for an unscheduled disability. Three issues are presented on appeal:

(1) whether the administrative law judge ("ALJ") erred by basing her finding that the respondent employee ("claimant") had sustained a permanent impairment on a medical examination that predated the stationary date;

(2) whether the ALJ erred by relying on a medical finding of permanent impairment that was not numerically rated pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"); and

(3) whether the ALJ selected an erroneous stationary date.

Because we find that the ALJ erred by relying on a finding of permanent impairment which predated the selected stationary date, we set aside the award.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law

de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003) (citation omitted). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002) (citation omitted).

II. FACTUAL AND PROCEDURAL HISTORY

¶3 On December 12, 2007, the claimant was employed by the petitioner employer, Labor Finders, and was assigned to work for a company that manufactured metal door guides.¹ While lifting door guides, the claimant sustained a low back strain. He filed a workers' compensation claim, which was accepted for benefits. Shortly after his injury, the claimant's family moved to California, where he continued to receive conservative medical treatment for his back injury.

¶4 On June 5, 2008, the claimant saw A. Michael Moheimani, M.D., for an "Initial Orthopedic Consultation and Permanent And Stationary Report." The doctor diagnosed a "ruptured disc L5-S1," and stated that "in all medical probability his injury is work related." Dr. Moheimani offered the claimant lumbar epidural blocks, which the claimant

¹ The record in this case is in two parts: the optical disk ("OD") file, which is sequentially numbered in the upper right-hand corner of each page, and the ALJ hearing file, which is not numbered. Documents contained only in the ALJ hearing file are referred to in this draft by date and description alone.

declined. The doctor concluded that the claimant "has reached maximal medical improvement as no additional treatment can be offered to alleviate his pain or cure him of the effects of his industrial injury." The doctor recommended supportive care and work restrictions "of no lifting more than 20 pounds and no repetitive bending and stooping." Finally, he stated:

APPORTIONMENT

The patient gives no history of a previous disability regarding his back. Therefore, I would apportion 100 percent of his disability to work-related factors.

PERMANENT AND STATIONARY

The patient has reached maximal medical improvement as of the date of this evaluation, June 5, 2008.

IMPAIRMENT

It should be noted the patient reports that he had neurodiagnostic testing performed of the lower extremities. In reviewing the submitted medical records, I did not find one. *I will hold off on giving the patient an impairment rating as it may be a difference between a Diagnosis Related Estimate category II or III based on the neurodiagnostic tests.*

(emphasis added).

¶5 Based on Dr. Moheimani's medical report, the petitioner carrier, FARA, issued a notice of claim status closing the claimant's claim with a permanent impairment. The claimant timely requested a hearing and submitted a narrative and medical records. Two ICA hearings were held with testimony from the claimant and independent medical examiner, Zoran Maric, M.D. Following the hearings, the ALJ entered an award finding

the claimant stationary with a permanent partial impairment. FARA timely requested administrative review, and the ALJ summarily affirmed her award. FARA then brought this appeal.

III. DISCUSSION

¶16 FARA first argues that the ALJ committed reversible error by awarding the claimant a permanent impairment based on a medical report, which was authored five months before the stationary date. In that regard, the ALJ found:

8. . . . Both Dr. Moheimani and Dr. Maric agree that applicant's injury is medically stationary and will not benefit from further active medical care. *I find applicant's injury became medically stationary as of November 17, 2008.*

9. The doctor's opinions conflict on the (a) diagnosis related to the industrial injury[;] (b) whether there is a permanent disability; and (c) whether applicant requires supportive care or permanent work restrictions. *I resolve the conflicts in favor of Dr. Moheimani's opinions as more probably correct.* I find that the applicant sustained a disc injury at L5-S1; that he should be given permanent work restrictions to include no lifting more than 20 lbs, and no repetitive bending or stooping; and that he is entitled to receive further evaluation and treatment if his condition flares up or his radicular pain reoccurs. In that vein, I find that applicant is entitled to supportive care to consist of three office visits annually with his treating doctor, and, if there are "flare-ups" applicant should be provided reasonable prescriptive medications, a series of epidural injections, and diagnostic testing, as prescribed for his lumbar spine injury.

(emphasis added).

¶17 Workers' compensation claims are administered through a progression of separate claim stages. *E.g., Hardware Mutual Cas. Co. v. Indus. Comm'n*, 17 Ariz. App. 7, 9, 494 P.2d 1353, 1355 (1972). After compensability is established, a claimant typically passes through three claim stages: temporary total disability, during which he is unable to work; temporary partial disability, during which he may engage in some work but continues to need active medical treatment; and permanent total or partial disability, after his condition has become medically stationary. *Id.*

¶18 A claimant becomes stationary when his medical condition is not subject to further improvement and he is discharged from active medical treatment. *See Janis v. Indus. Comm'n*, 27 Ariz. App. 263, 265, 553 P.2d 1248, 1250 (App. 1976). Once a claimant's condition becomes stationary, he is no longer entitled to receive temporary disability benefits, but he may be entitled to receive permanent disability benefits, if he can show entitlement. *See Cont'l Cas. Co. v. Indus. Comm'n*, 23 Ariz. App. 294, 296, 532 P.2d 869, 871 (1975).² On the date the injury becomes stationary, the carrier is no longer required to

² When a physician discharges a claimant from treatment, she is required to determine whether the claimant has sustained any permanent impairment of function resulting from the industrial injury. *See* Arizona Administrative Code ("A.A.C.") R20-5-113(B).

pay temporary disability benefits, and instead, the ICA is required to compute permanent disability benefits, if any. See A.R.S. § 23-1047(A) (Supp. 2009); *Minton v. Indus. Comm'n*, 90 Ariz. 254, 258, 367 P.2d 274, 277 (1961).

¶9 This court applied these provisions in *Hecla Mining Co. v. Indus. Comm'n*, 119 Ariz. 313, 580 P.2d 774 (App. 1978). In *Hecla*, the claimant sustained a low back injury. Following treatment, he underwent an independent medical examination ("IME"). The IME found the claimant stationary with no permanent impairment as of the June 22, 1976 examination. The carrier then issued a notice of claim status finding the claimant stationary and closing his claim based on the IME report. The claimant timely protested, and an ICA hearing was held. The claimant's treating physician testified that when he last saw the claimant on May 19, 1976, he was stationary with a permanent impairment. The ALJ then entered an award finding the claimant stationary on June 22, 1976, but awarding a permanent impairment based on the May 19, 1976 evaluation.

¶10 On appeal, this court set aside the award. We held that

[t]hese findings are fatal to the award. Having adopted June 22, 1976 as the stationary date, the hearing officer committed error in accepting Dr. Busenkell's opinion of permanent disability based on the May 19, 1976 valuation. Furthermore, Dr.

Busenkell testified that when he last examined [claimant] he expected his condition to improve.

119 Ariz. at 314, 580 P.2d at 775 (citations omitted).

¶11 We have the same problem in this case as recognized in *Hecla*. The ALJ awarded the claimant temporary disability benefits through the date of Dr. Maric's addendum medical report on November 17, 2008, i.e., the stationary date, but she awarded the claimant permanent disability benefits pursuant to a medical report authored five months earlier, on June 5, 2008, before the claimant became medically stationary. According to *Hecla*, this is a "fatal" error.

¶12 By definition, the right to an evaluation of permanent impairment does not arise until after a claimant becomes medically stationary. Permanent impairment and permanent disability are often used interchangeably, which is imprecise. The Arizona Supreme Court addressed this issue in *Smith v. Indus. Comm'n*, 113 Ariz. 304, 305-06 n.1, 552 P.2d 1198, 1199-200 n.1 (1976):

We adopt the definitions of the terms "permanent impairment" and "permanent disability" found in the *Preface* to the AMA Guides:

"(1) Permanent Impairment. - This is a purely medical condition. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or non-progressive at the time evaluation is made. It is always a basic

consideration in the evaluation of permanent disability.

"(2) Permanent Disability. - This is not a purely medical condition. A patient is "permanently disabled" or "under a permanent disability" when his actual or presumed ability to engage in gainful activity is reduced or absent because of "impairment" which, in turn, may or may not be combined with other factors. . . .

For that reason, the ALJ cannot rely on a finding of permanent impairment made before she concludes that the claimant is stationary.

IV. CONCLUSION

¶13 For the foregoing reasons, we set aside the award. Based on our resolution of the initial issue, it is unnecessary to address the remaining issues raised on appeal. Nothing in this decision, however, precludes the ALJ from making a new decision on remand which would reconcile the conflict between the stationary date and the date of the award of permanent

impairment. See A.A.C. R20-5-152(A); *Employers Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*, 115 Ariz. 439, 442, 565 P.2d 1300, 1303 (App. 1977) (effect of setting aside an award on appeal).

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

MICHAEL J. BROWN, Judge